IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 25TH AUGUST 2005 / 3RD BHADRA 1927

Crl.MC.No. 9314 of 2002()

CC.128/2002 of JUDL. MAGISTRATE OF FIRST CLASS-I, KOZHIKODE

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PETITIONER: ACCUSED

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1. NISHI.M, D/O.LATE MUHAMMEDALI,
"CHEMBAKA", CHEMBAKA HOUSING COLONY,
CHALAPPURAM P.O., KOZHIKODE-2.

2. SULAIKHA, W/O.MUHAMMEDALI,
"CHEMBAKA", CHEMBAKA HOUSING COLONY,
CHALAPPURAM P.O, KOZHIKODE-2.

3. SHYNI, D/O.LATE MUHAMMEDALI,
"CHEMBAKA", CHEMBAKA HOUSING COLONY,
CHALAPPURAM P.O. KOZHIKODE-2.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS: COMPLAINANT & STATE

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1. MUHAMMED HASHEER, S/O.ALIMUHAMMED,
AL ROOBI", RAMANATTUKARA P.O.,
KOZHIKODE TALUK.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY ADV. SRI.V.N.RAMESAN NAMBISAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 25/08/2005, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

Crl.M.C.No.9314 of 2002

Dated this the 25th day of August, 2005

O R D E R

Petitioners are accused in C.C.No.128/2002 on the file of the Judicial Magistrate of First Class-I, Kozhikode. On a complaint filed by first respondent, summons were issued to them for offences under Sections 417, 494, 495, 497 and 34 IPC. The copy of the summons is Annexures C to F. the petitioners seek to quash the entire proceedings initiated against the petitioners on various grounds.

2. Petitioners are ladies. It is alleged that the first petitioner cheated the complainant-first respondent and induced him to marry her, though she was married earlier. It is also alleged that the petitioners have, in furtherance of common intention, committed offence of bigamy and adultery. The trial court, after taking sworn statement of the complainant, took cognisance of offences under Sections 417, 494, 495, 497 and 34 IPC and issued summons to them.

3. Learned counsel for petitioners strenuously contended that none of the alleged offences under Sections 417, 495 and 497 IPC are made only against the petitioners. It was pointed out that the offence under Section 497 IPC will not lie against a female, as it is

evident from a reading of the Section itself. All the petitioners are females and hence taking of cognizance of offence under Section 497 IPC against the petitioners who are females is illegal.

4. Coming to the offences under Sections 494 and 495, it was argued that to constitute such offence, there must be a second marriage which is legally performed. Learned counsel for petitioner placed reliance upon the decision reported in ***Kanwal Ram v. H.P.Administration*** **(AIR 1966 SC 614)** and argued that in a bigamy case, the essential ceremonies constituting the second marriage must be proved and even the admission by the accused may not be sufficient to prove second marriage. In cases where there is no evidence to prove the essential ceremonies of a marriage, no offence can be said to be made out, it is strongly contended.

5. It is held in ***Gopal Lal v. State of Rajasthan*** **(AIR 1979 SC 713)** as follows:

> "Where a spouse contracts a second marriage while the first marriage is still subsisting the spouse would be guilty of bigamy under S.494 I.P.C. if it is proved that the second marriage was a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. The voidness of the marriage under Section 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Section 494 I.P.C. because the second marriage will become void only because of the provisions of Section 17 of the Hindu Marriage Act. What Section 17 of the Hindu Marriage Act contemplates is that the second marriage must be according to the ceremonies required by law. If the marriage is void its

> voidness would only lead to civil consequences arising from such marriage. Section 17 of the Hindu Marriage Act has to be read in harmony and conjunction with Section 494 I.P.C. Therefore, merely because the second marriage is void under Section 17 of the Hindu Marriage Act it cannot be said that Section 494 will not be attracted."

6. Learned counsel for petitioners also argued that as per the allegations in the complaint, the first petitioner and the first respondent are Muslims and their marriage can be solemnised only under the Mahomedan Law. Requirements of a Muslim marriage are essential to establish a marriage between them. In Mahomedan Law by Mulla 19th Edition at page 224 essentials of a marriage are laid down and a reading of the same that to prove a valid Muslim marriage, there must be a proposal made by or on behalf of the one of the parties to the marriage. But there is nothing on record to show that there was the proposal or an acceptance, it is contended. There is also nothing to show that proposal and acceptance were expressed at one meeting. Even though no religious ceremony is essential for a valid Muslim marriage, the most essential requirement is a proposal and acceptance, but according to learned counsel for petitioners, the records in this case do not establish the said fact at all.

7. On the other hand, the specific case of the complainant is that the marriage was by a registered agreement and they have lived together as husband and wife based on the said document. As

per the recital in the said document, both parties have “decided to accept” each other as husband and wife. But it was argued that an execution of such a document may not be sufficient to hold that that is a legally valid marriage between the first petitioner and first respondent and therefore the petitioners cannot be proceeded against for offence under Sections 494 or 495 IPC. But, the trial court did not consider the above aspects but mechanically issued process to the accused, it is submitted.

8. Another contention raised is with respect to the offence under Section 417 IPC. The definite case of the complainant is that he was cheated by the first petitioner by "making him believe" at the time of marriage the first petitioner was unmarried. He has allegedly prepared himself for the marriage only because of such belief. But he was cheated, is the contention. Learned counsel for petitioners submitted that the only allegation in the complaint is to the effect that the first petitioner had told the complainant at the time of marriage that she was unmarried and made him to believe this fact and that is why he was prepared to marry her. But at the time when the sworn statement was taken, there was absolutely no whisper regarding any such inducement, deception etc. On the other hand, as per the sworn statement the first petitioner had not told him that she was married earlier but, he had married her because he

`knew' that she was unmarried. According to learned counsel for petitioners, the allegations made in the sworn statement are totally insufficient to conclude that there was deception or intentional inducement on the complainant to marry the accused.

9. It was also argued that the ingredients of offence of cheating under Sections 415, 417 and 419 are not made out in this case and learned Magistrate ought not to have issued process to the accused, without confirming whether the allegations in the complaint and documents prima facie constitute the alleged offences. It was also submitted that in a frivolous complaint, especially in summons case, the accused will not get any chance to object to the proceedings and get it dropped at the inception. Therefore, unless the courts pay proper attention, caution and care while dealing private complaints involving summons cases, the accused will be unnecessarily dragged to the court and face the entire trial indefinitely for a long period, for no fault of his, at the instance of a motivated compliance.

10. I am satisfied that the lower court ought to have paid more attention to the relevant facts, before issuing process to the accused. The arguments raised by the learned counsel for petitioners cannot be brushed aside lightly. But, in proceedings under Section 482 Cr.P.C., it is not proper for this court to make a meticulous enquiry into the

various factual disputes and decide the falsity or otherwise of the complaint and come to a conclusion whether the complaint is false or frivolous. However, in the light of the arguments advanced in this case, I am satisfied that the lower court has not applied its mind to the various relevant factors involved in this case, before issuing process to the accused. The whole matter therefore, requires a reconsideration, in the light of the various points mooted in this petition . Hence, the impugned order is hereby quashed. The case is remanded to the trial court to reconsider the matter afresh and proceed in accordance with law, untrammelled by any of the observations, if any, made in this judgment, on merits.

Petition is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

Crl.M.C.NO.9314 OF 2002

O R D E R

25.08.2005